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The Advent of the Administrative Process and Its Future

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THE ADVENT OF THE ADMINISTRATIVE PROCESS AND ITS FUTURE*

EVERY government exercises three governmental powers that are necessary for its existence. They are Taxation, Police Power, and the Power of Eminent Domain. Every government, however crude, or whatever we may call it, must have the power first to make the law, which is called the legislative power; second, it must have the power to declare what the law is, which is the judicial power; and third, it must have the power to enforce the law and this is called the executive power.

In the very early governments such as the government of the clan or tribe, these three powers of government were exercised by one person — the chief. So, in an absolute monarchy, these three powers are vested in one person, the czar or emperor. Today, in the dictatorship of Europe, the dictator exercises both legislative and executive powers and controls the courts. In our country we are committed to the doctrine of separation of powers and our constitutions provide for such separation. These three powers are exercised by distinct persons or groups of persons. Under our

*A paper read before The ROUND TABLE, a discussion group in South Bend, Indiana, on the 5th day of February, 1941.

constitutions, the congress or legislature legislates, the courts declare, construe and interpret the law, and the president or governor executes or enforces the law. Checks and balances in the exercise of these powers are thus provided, and our rights and liberties better secured.

From the very beginning of our government, the proper exercise of these three powers required agencies such as committees, boards, bureaus and commissions. Our congress and our legislatures have and do carry out the legislative powers through committees, boards and commissions. The president and the governor always have had and must have administrative agencies to properly carry out the executive powers of government. Why, even the courts, in order to properly carry out the judicial function, utilize administrative agencies such as commissions or referees to take testimony, adjusters, receivers, appraisers, etc. Administrative agencies such as these are nothing new in government. They have existed since organized government began. They are the officials appointed or elected to do the detail work and to carry out the will of the legislative, executive and judicial branches of government.

Since the Civil War, and especially since 1900, there has been a steady and at times a speedy growth of administrative agencies. Their advent has been heralded and viewed with alarm and those appointed to carry out the purposes for which they were created have been maligned. There have been wild estimates as to the number in each State and in the federal jurisdictions. That at times an unnecessary board or commission was created ought not to justify a condemnation of the entire administrative machinery of government. Our democratic government simply cannot function without them.

Right here let me quote from the address of Judge John J Parker of the United States Circuit Court of Appeals, before the Annual Meeting of the Nebraska State Bar Association on December 28, 1940:

"One of the outstanding developments of recent years has been the growth in the executive departments of our governments, state and federal, of administrative agencies combining with their executive functions powers which are essentially legislative or judicial in character. There are more than a hundred and fifty such agencies in the federal government alone. Every state government has a large number of them for dealing with such matters as taxes, public utilities, insurance, securities, workmen's compensation, and social security. To my mind it is utterly futile to inveigh against the growth of these tribunals. That growth has been perfectly natural. Under the conditions of modern life it is absolutely necessary that the state regulate economic life. *Laissez faire* is gone. The conflict is not between *laissez faire* and regulation, but between regulation and some form of state socialism. If socialism is to be avoided, the state must regulate economic life. The courts cannot furnish this regulation. The legislature cannot furnish it. It can only be furnished by these administrative agencies combining, as they do, certain executive, judicial and legislative functions. And, if government is to exercise the control over economic life essential to the preservation of free enterprise, some such form of administrative agency is absolutely necessary to the proper and efficient exercise of governmental power. The problem is, not to prevent their growth, but to preserve in their processes the fundamental principles of freedom which have come down to us from the fathers." [1]

It is my purpose to discuss a few of the boards and to give answer to the following questions; why were they created? what purposes do they carry out? do they impair or destroy our rights and liberties? what of the future? can democracy work without them?

Following the Civil War there was a great "western movement." There was great expansion in the building of railroads. Practically all of the interstate commerce was then carried on by the railroads. The organization of railroad companies and the construction of railroads involved large expenditures of money. To pay for this and make profit, it was nothing unusual for railroad companies to exact excessive rates, make discriminatory contracts as to rates, in violation of law. What was happening then is better stated by Justice Shiras of the United States Supreme Court in the

[1] Hon. John J. Parker, "Improving the Administration of Justice," 27 A. B. A. J. 71, 75 (1941).

case of *Texas & Pacific Railway Company v. Interstate Commerce Commission.*[2]

"While shippers of merchandise are under no legal necessity to use railroads, practically they are. The demand for speedy and prompt movement virtually forbids the employment of slow and old-fashioned methods of transportation, at least in the case of the more valuable articles of traffic. . . . From the very nature of the case therefore, railroads are monopolies, and the evils that usually accompany monopolies soon began to show themselves, and were the cause of loud complaints. The companies owning the railroads were charged, . . . with making unjust discriminations between shippers and localities, with making secret agreements with some to the detriment of other patrons, and with making pools or combinations with each other, leading to oppression of entire communities.

"Some of these mischiefs were partially remedied by special provisions inserted in the charters of the companies and by general enactments by the several States, such as clauses restricting the rates of toll and forbidding railroad companies from becoming concerned in the sale or production of articles carried and from making unjust preferences. Relief, to some extent, was likewise found in the action of the courts in enforcing the principles of the common law applicable to common carriers — particularly that one which requires uniformity of treatment in like conditions of service.

"As the powers of the States were restricted to their own territories, and did not enable them to efficiently control the management of great corporations whose roads extend through the entire country, there was a general demand that Congress, in the exercise of its plenary power over the subject of foreign and interstate commerce, should deal with the evils complained of by a general enactment, and statute (Interstate Commerce Act) in question was the result."

The Interstate Commerce Commission Act was passed February 4, 1887, and the Commission was established March 22, 1887. This Act was so clearly within the powers of congress over interstate commerce that no serious question was raised as to its constitutionality. Most of the questions raised were with reference to the powers conferred upon the Commission and the extent of those powers. However, the Act was not free from attack in the courts. By decisions the original Act soon proved to be quite ineffective. Courts strictly limited the power of the Commission to the

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2 162 U. S. 197, 16 Sup. Ct. Rep. 666, 40 L. Ed. 940 (1895).

prevention of excessive rates and unjust discrimination in rates. Courts denied to the Commission the power to fix rates for the future. Because of these limitations it became necessary for congress to amend the Act every few years. These amendatory acts were passed to remedy the defects in the original Act and give added powers to the Commission which the courts denied. Let me cite a few of these amendments.

The amendatory act of 1889 gave the shipper a more effective remedy by writ of mandamus to compel carriers to furnish equal facilities.

The act of 1893 amended procedure by overcoming the difficulty in enforcing self-incriminatory testimony.

The act of 1903 (sometimes called the Elkins Law) made very important changes and improved the provisions against discrimination and make the published rates conclusive against the carrier. Fine was substituted for imprisonment in the penal provisions of the act. The act of 1903 was procedural and expedited the procedure in suits brought by the United States or suits brought by the attorney general in the name of the Interstate Commerce Commission.

In 1906 the amendatory act (sometimes called the Hepburn Act) prohibited free passes and prescribed the so-called "Commodity Clause" which prohibited the railroads from transporting their own commodities not used in the railroad business.

The amendatory act of 1910, known as the Mann-Elkins Law, "enlarged the substantive provisions of the act to regulate commerce, corrected numerous defects which experience had disclosed, conferred upon the public new rights and remedies and correspondingly increased the jurisdiction and authority of the Commission." Since that time, with the expansion in business and industry as interstate commerce grew other amendatory acts have been passed.

About 1900 the work of the Commission was recognized by both the public and the railroads to be, on the whole, satisfactory. Both the public and the railroads would have resisted then and would resist today any attempt to abolish the Commission and return to the days of 1886.

Not only that, so satisfied were the people of the United States with the regulation of interstate commerce by the Interstate Commerce Commission, that legislatures of the States have created commissions to regulate intra-state commerce and local public utilities. Time will not permit me to relate the story of the advent of and the public service performed by State public utility commissions. They have saved to the American public incalculable millions in public utility rates. Because of their cooperation with the commissions in the regulation of rates, in matters of safety, service, and comfort to the people, America today can rightly and proudly boast of the greatest public utility service in the world.

Now, why Workmen's Compensation Acts and Compensation Boards and Commissions? The public satisfaction with the work of the Interstate Commerce Commission and the Public Utilities Commissions was partly responsible for the steady enactment of Workmen's Compensation Acts in all but one State and in the federal jurisdiction.

There were other factors which contributed. The success with which compensation legislation met on the continent of Europe, in Great Britain and Canada was a factor. But, the dissatisfaction of the public with our personal injury suits gave the commanding impetus to our legislators for action.

Legislative ad interim committees were appointed in Massachusetts in 1903; in Illinois in 1905; in New York, Wisconsin and Minnesota in 1909. These committees made a thorough investigation of different acts and their operation, and of the conditions existing in practice in personal-injury

cases. Exhaustive reports were made in the sessions that followed. The reports showed an appalling condition existing in our swiftly expanding industrial system. The investigation disclosed that out of every $100 that industry paid out for negligent injuries only $30 of it went to the injured employee and $70 went to expenses for investigators, attorneys' fees and court costs. Many of us here, and especially the older lawyers, remember the lawsuits against railroads, sawmill and other manufacturing companies. Results in such actions many times hinged not on facts and substantial rights, but upon technicalities of procedure and upon the skill of the attorneys. In the court rooms we saw attorneys arguing demurrers and motions. We witnessed sharp cross-examinations, badgering of witnesses, objections to the admission of truth sometimes ruled out on some technical rule of evidence. We would also hear great pleas made to the jury, great orations, sometimes with appeals to passion and prejudice. At times in the corridors and on the courthouse steps we would see lame and crippled men. We would listen to verdicts of juries, one plaintiff getting $1,000, and another $5,000, and another nothing for practically the same kind of injury.

Let me relate briefly the facts and procedure in a case 35 years ago. Johnson, a young man 18 years old, was an employee of a wood-working company. He was employed at operating a rip-saw. His work was to split 4-foot bolts into square pieces. He placed the bolts on the carriage of the rip-saw and ripped them by pushing the carriage back and forth through the saw. While he was pulling the carriage toward him a piece of slab was thrown toward him by the teeth of the saw. He threw up his hand to protect his head, the slab struck him and broke his wrist so that he was laid up for 12 weeks and suffered about 25% permanent disability in the use of his hand. The complaint filed was for $3,000 damages. The defendant company was represented by an insurance company attorney. For some reason, the

case was postponed over the term, which delayed action for six months. At the next term the case came up for trial. It took two days to try the case. Some testimony was ruled out and some of it was admitted under objections, after arguments. There was a lengthy argument over the introduction of an answer to a question whether or not a splitter was put on the saw the day after the accident. Johnson testified that there was no splitter on the saw at the time of the accident; the foreman testified that there was a splitter on the saw; a witness testified that the splitter was taken off for repairs, and a controversy then arose as to whether the witness could testify that the splitter was put on after the accident. The court ruled this evidence out saying that under the rule it was contrary to public policy to admit such evidence. At the conclusion of the evidence, a motion for a directed verdict was argued upon the following grounds: first, that there was no proof of negligence; second, that the plaintiff was guilty of contributory negligence; and third, that from the testimony in the case it was impossible for the accident to have happened, because the pulling of the carriage back with the cant in place made it impossible for the slab to be caught by the saw and thrown toward the plaintiff. Demonstrations of this were made before the jury. The court overruled the motion and the case was submitted to the jury. After the usual oratory, the jury was instructed, and after two hours of deliberation returned a verdict for the plaintiff for $1,000. Ten days were given to the defendant for preparing and filing a motion for a new trial. A month later the motion was argued on practically the same points that were raised in the motion for a directed verdict plus that the verdict was excessive. The court decided that he would grant a new trial unless the plaintiff would remit $300 and gave the plaintiff ten days in which to make up his mind. Upon consulation with his attorneys and his father, and upon contemplating the torture of another trial, Johnson accepted the $700 plus costs.

It took nearly two years from the time of the accident before Johnson got what was left of the $700 after he paid attorneys' fees. The story of Johnson's case was not an unusual one.

How long would to take for Johnson to get compensation for his injuries under a Workmen's Compensation law? I venture to say that it would take about half an hour. The chances are that he would be paid his compensation without a hearing before the Industrial Commission. If there was a contest it would probably be over the period of total disability and the extent of the permanent disability. There would be no question about contributory negligence on the part of Johnson, nor negligence on the part of the company. Nor would it matter whether the splitter was put on the saw before or after the accident. There would be no question raised as to the impossibility of the accident to happen. It did happen and Johnson sustained injuries. If there was a hearing before the Commission it would probably proceed like this: the parties would stipulate that at the time of the accident, (1) both parties were subject to the Compensation Act; (2) that Johnson was injured while at work; (3) that he was unable to work, say for 12 weeks. Probably the only question in dispute would be that of the extent of permanent disability. Testimony of one or two doctors as to the extent of permanent disability would conclude the evidence. Let us suppose that the permanent disability was fixed at 25%. How much compensation would be paid to Johnson in a State which allows a compensation rate of 66-2/3% of the average weekly wage and allows 240 weeks for the loss of a hand at the wrist? If, at the time he was employed, he was getting $15 per week, his compensation rate would be $10 a week. Twelve weeks plus ¼ of 240 weeks or 60 weeks, equals 72 weeks. 72 times $10 is $720, about the same amount which was allowed in the personal injury action. Can there be any doubt that the ad-

ministrative process is preferable to the process in the personal injury actions in court?

With evidence of the existence of such conditions in our industrial system, States vied with each other in the enactment of the Workmen's Compensation Laws. New York was the first, in 1910, but that act was declared unconstitutional. The constitution was amended and a valid act was passed in 1913. Legislatures of the following States enacted compensation acts in 1911: Wisconsin, May 3rd; Nevada, July 1st; New Jersey, July 4th; California, Sept. 1st; and Washington, October 1st. Many of the other States followed during 1912 and today every State and federal jurisdiction have Workmen's Compensation Acts except Mississippi.

I have probably discussed too much in detail the advent of the Compensation Board. That is due to two reasons. One is because of my familiarity with it and the other one is the similarity of reasons for the advent of one or two other boards which I will discuss.

What about the advent of the Federal Trade Commission Act which was passed by Congress on September 16, 1914. Why was it necessary to create the Federal Trade Commission? Following the Civil War came the 14th Amendment to the United States Constitution. That Amendment reads, in part, as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Anyone, familiar with the history of our reconstruction period, knows that the purpose of this Amendment was to secure equality and protection to those individuals who were made citizens under the 13th Amendment.

When congressmen voted to submit the 14th Amendment to the States, and the State legislators voted to ratify it, they had no thought that this Amendment would be employed as

a refuge for the protection of franchises and property of private corporations. When the United States Supreme Court, by a line of decisions, held that corporations were "persons" within the provisions of the 14th Amendment, it practically annulled the reserve powers for alteration, amendment or repeal of general incorporation laws. These decisions sounded the death-knell to any control over corporations by the people through their legislatures. This did more to promote the use of corporations for the expansion of business and industry than any other cause. Our industry grew and expanded and capitalization doubled and tripled every few years and so did production. At first the activities were local and confined to one State, but under a liberal system of licensing corporations, the field of industry became national and with this came the trusts. These soul-less persons organized for profit and for profit alone, destroyed all competition. The little industries which were the pride of many communities in America were eliminated. Then came the State anti-trust laws, then followed subterfuges to evade them and feeble efforts to enforce them. Such conduct being inimical to the public welfare, and States, under their State laws being unable to cope with this conduct, Congress on July 2, 1890 passed the Sherman Anti-Trust Act. This statute was enacted for the purpose of protecting freedom of trade; maintaining free competition and securing equality of opportunity in trade. The United States Supreme Court said: "The Anti-Trust Act was intended in the most comprehensive way to provide against combinations or conspiracies in restraint of trade or commerce, the monopolization of trade or commerce or attempts to monopolize the same."[3]

Did the Sherman Anti-Trust Act accomplish the purpose for which it was enacted?

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[3] *Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 165, 35 Sup. Ct. Rep. 398, 59 L. Ed. 520 (1914).

Prolonged litigation in the courts, technicalities of procedure, strict and strained construction by the courts, limited the enforcement of the Sherman Act, and trusts and monopolies continued their occupation of restraining trade and using unfair and discriminatory practices in trade. Equality of opportunity and the right of freedom of trade continued to be destroyed. So dilatory and ineffective were proceedings in the courts, in enforcing the Sherman Act that Congress enacted the Federal Trade Commission Act, creating another commission. As in the case of the Compensation Acts, attacks on its constitutionality were made, but without success.[4]

For over 25 years the Federal Trade Commission has operated and has succeeded so well in destroying unfair methods and practices in industry and trade that industry would oppose its abolishment.

Now, what about the National Labor Relations Act and the National Labor Relations Board? There has been more discussion of this Act than any of the others. It has been more controversial than any of the others. That is undoubtedly due to the fact that it deals with controversies that have existed for over half a century and continue to this very day. The controversies started with the beginning of the trade movement in the United States, and have continued since, and from what we hear daily over the radio, are still going on. Why a trade movement in America? It started at about the time of the begnning of corporate and industrial expansion which I referred to a moment ago. There are three essentials to a successful and prosperous industry — Capital, Labor, and Consumer. Much was done for the promotion and security of capital. Although aids were given to capital, labor was left to fight its own battle. What about labor during our spree of expansion and production? What about the consumer made up largely of the

[4] 41 C. J. § 79-⅓, p. 114.

laboring men and the farmers of America? Was it not the neglect of labor and the farmer that was responsible for the business and industrial depression in 1929? Was it not an unequal struggle between capital and labor that made it necessary for labor to organize? Capital is organized. Why not labor? Capital acts collectively and through representatives. Why not collective bargaining for labor? It was only through the combined efforts of organized labor that labor was able to obtain some share of the fruits of expanding business and industry. Here are a few examples of contest between labor and capital. The struggle started over the recognition of organized labor. Capital refused to recognize labor unions and a laboring man seeking employment had to sign a contract that he would not join a labor union if he wanted the job, or wanted to keep his job. These contracts were referred to by labor as "yellow-dog contracts." Then came the struggle over injunctions in Labor-Capital controversies, the struggle for minimum wage laws, for shorter hours of labor, for child labor laws, for workmen's compensation laws, for safety laws, for social security laws, and for a recognition of the principle of collective bargaining.

During the World War, a war labor board under the co-chairmanship of ex-president Taft and Frank P. Walsh was organized for a settlement of controversies between labor and capital. Many of the rules prescribed by this board were embodied in the Railway Labor Act which was passed on May 20, 1926.

The main provisions of the Act, in brief, were as follows:

1. It provided for voluntary settlement of disputes between carriers and employees through chosen representatives of both parties.
2. It provided that such representatives be choosen without interference, influence, or coercion by either party and that representatives need not be persons in employ of the carrier.

3. It provided for recognition of the right to organize and bargain collectively.
4. It voided agreements to join or not to join a labor union — outlawed the so-called "yellow-dog contracts."
5. It provided for a national labor adjustment board and for procedure before it if voluntary settlement could not be made.

By the application of the provisions of the Railway Labor Act and the work of the National Railroad Adjustment Board, we have had no railroad strikes since that Act was passed.

Because of the frequency of labor disputes and strikes in other industries, Congress embodied some provisions of the Railway Labor Act in the National Industrial Recovery Act passed on June 16, 1933. Section 707 of that Act secured for labor in industry — (1) recognition of the right to organize and bargain collectively; (2) outlawed the "yellow-dog" contract; (3) provided for compliance with maximum hours of labor and minimum wages and other conditions of employment approved or prescribed by the President. On May 27, 1935 the N. I. R. A. was declared unconstitutional.[5] Within two months following the decision, Congress on July 5, 1935 passed the National Labor Relations Act and created the National Labor Relations Board. In passing this Act, Congress had the same purpose in view as in passing the Railway Labor Act and it was hoped that it would meet with similar success.

Railroads cooperated in making the Railway Labor Act work, but a different story must be told as to the cooperation of industry with the National Labor Relations Act. This Act has been subject to the fiercest attacks by industrialists, corporation lawyers, columnists, newspapers and

[5] *A. L. A. Schechter Poultry Corporation v. United States*, 295 U. S. 495, 55 Sup. Ct. Rep. 837, 97 A. L. R. 947, 79 L. Ed. 1570 (1935).

politicians, and the attacks continue, unabated. It is beyond understanding why this law is subject to such vicious attacks, and the Railway Labor Act which contains similar provisions as to labor relations, is lauded to the skies. Here is a law whose purpose is the promotion of peace in industry, for the securing of a long-sought justice and square deal for the great masses of laboring men of America; — for social justice, if you please. Strikes are burdensome to capital and cause untold suffering to laboring men and their families; and yet, our industrialists do not show that cooperative spirit with a law whose purposes are to prevent strikes. Then, too, I think it is a tragedy that during the beginning of procedure under this Act, labor, although united in support of it, is rent in twain. This has not only brought controversies between labor and capital, but controversies between the two factions in organized labor.

I repeat, it is beyond understanding why this Act should be subject to such violent attacks and the honorable men who have worked so hard and so ably to administer it, have been unjustly slandered and maligned. I attribute the opposition to this Act to selfishness which has grown up among the people in America and especially the investors and managers of our corporations. The corporation — the soul-less entity — which has, under our laws, grown so enormous and so powerful that instead of being a servant of the people it has become a monster for their destruction. Because of its size, its complexity and the multifariousness of its conduct, it has destroyed and is destroying all human relations in business and industry. Being organized for profit, it has promoted greed, made men lose all sense of human values, and led them to worship at the shrine of mammon. In the mad rush for profits and wealth, human rights and human welfare are forgotten. These soul-less creatures that have destroyed man's humanity to man; that have encouraged the concentration of wealth in the hands of the few; that have promoted over-expansion in industry which brought

about the depression in 1929, must mend their ways. Through their managers they must show a better spirit of cooperation with American labor, if our industrial system and our American way of life is to survive in this world of isms destructive of "rights of life, liberty and the pursuit of happiness."

That there has not been a wholesome cooperation on the part of industry is illustrated by the recent refusal by a company of the use of one of its plants for an election for the choice of a labor-bargaining agency.

Another corporation, admitting that the facts in a written agreement were as agreed to by labor and management, refused to sign such agreement. The controversy over this petty and unreasonable refusal on the part of management was carried to the Supreme Court of the United States, and in a decision handed down on January 6, 1941, the Supreme Court unanimously held that such a refusal was an unfair labor practice.[6]

I do not mean to convey by this, that organized labor is without fault. Its demands have many times been unreasonable. The division within its ranks have brought unnecessary disputes between labor and industry. Then, too, in its ranks are found men who believe in foreign isms that are contrary to our way of life, — isms that would destroy basic American rights of liberty and property. Such men, by their voice and conduct, stir up unnecessary controversies between labor and capital and, it seems, would rejoice in the fall of our industrial system. However, I must add this, that labor showed a real cooperative spirit when it accepted the decision of the Supreme Court of the United States outlawing sit-down strikes. We have had no such strikes since.[7]

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[6] *H. J. Heinz Company v. National Labor Relations Board,* 61 Sup. Ct. Rep. 320 (1941).

[7] *National Labor Relations Board v. Fansteel Metallurgical Corporation,* 306 U. S. 240, 59 Sup. Ct. Rep. 490, 83 L. Ed. 627 (1938).

Today, over the radio and in the press, we hear of strikes and threats of strikes. I sometimes wonder if these frequent reports are not propaganda to discredit the work of the National Labor Relations Board. Many of these controversies are over trivial matters. In recent weeks most of these have been adjusted through the fine service of representatives of the National Labor Relations Board. Probably one reason that so many strikes are being prevented and are being speedily settled is because of the present threats to our Democracy from without. Men in both labor and industry, though selfish at times they may be, are united patriotic Americans in the preservation of the American way. What is this American way we desire to preserve? Will we preserve it if we are only "go-getters and not go-givers?" In our American life, unless we give as well as take, we will not be able to save the American way. In industrial disputes, unless those who represent Capital and those who represent Labor meet in a spirit of fair play, we will not have peace in industry. Unless they meet, not as organizations but as Americans, yielding and receiving what is fair and just to both sides in a spirit of brotherhood, we will not save Americanism and our Democracy. Let me quote a definition of true Americanism by Dr. Dorothy Reed of Oregon:

> "Life, liberty and the pursuit of happiness; life instead of mere existence, a life which precludes insecurity and unsanitary and unwholesome conditions of living; liberty instead of license, a liberty which precludes crime and lawlessness and graft and anarchy; and the pursuit of happiness instead of mere gratification of the senses, a happiness which leads to a higher plane of social and political intelligence, a shift of emphasis from things to thoughts, from material success to a better understanding of man's relation to man and man's relation to his God."

What about the constitutional validity of these Acts creating boards and commissions? We all agree that strictly governmental affairs and public utilities and interstate railroads are unquestionably subject to government regulation which may be by boards and commissions. The constitu-

tional validity of such boards is seldom raised and is quite uniformly conceded. But the boards and commissions to which strenuous constitutional objections are being raised, are those that regulate private affairs and private trade and business. As to these, Col. Henry Watterson, the great editor and publisher of the Louisville Courier Journal, once remarked, "It has come to a pretty pass when a man can't wallop his own jackass."

Of the Acts creating boards and commissions that I have discussed thus far, the Workmen's Compensation Act, the Federal Trade Commission Act, and the National Labor Relations Act did create boards and commissions that regulate private affairs.

The Workmen's Compensation Acts were not accepted without contest. As soon as these Acts were passed, actions were started to test their constitutionality. No time was wasted. Unlimited resources were devoted to law research and employment of counsel. Able arguments of learned counsel were presented on both sides. Every possible question as to validity was raised, argued and considered. Let me recite a list of ten claims as violations of the Constitution that were raised against the Compensation Acts: (1) Denial of liberty and property without due process of law; (2) Denial of equal protection of law; (3) Denial of a jury trial; (4) Delegation of legislative power to a commission; (5) Delegation of judicial power to a commission; (6) Impairment of the obligation of contract; (7) Denial of freedom of contract; (8) Abrogation of employer's defenses; (9) Providing for liability without fault; (10) Contrary to public policy. Practically the same grounds of unconstitutionality that were made against the Compensation Acts then, have been raised against similar Federal Acts, against the National Labor Relations Act, and other statutes regulating private affairs with two added: (1) That the powers exercised were not granted to Congress in the Federal Constitution; and (2) that the enactment violated the Bill of

Rights of the Federal Constitution. Contentions against federal legislation passed during the first World War, and following it, have become a daily dozen. Day after day, in the halls of Congress, in the press, before dinner clubs and social clubs, during a political campaign, and after a political campaign, there is this continual rythmatic exercise of condemnation of boards and commissions on constitutional grounds.

However, in only two States were Compensation Acts declared unconstitutional. One of the States amended its constitution and re-passed the Act, and the other shortly passed one which stood the constitutional test.

Time will not permit a discussion of all the contentions made against the validity of the Compensation Acts and the National Labor Relations Act. Some of these contentions were without much merit and were easily disposed of. I will briefly discuss those contentions that deal with, — (1) violation of the bill of rights of the State and federal constitutions; and (2) those that deal with the doctrine of separation and delegation of powers; and (3) those that deal with the granted and implied powers of Congress in passing federal regulatory Acts such as the National Labor Relations Act.

At the outset I stated that every government exercises three inherent governmental powers, namely, Taxation, Police Power, and the Power of Eminent Domain. In considering the validity of a State regulatory law such as the Compensation Act, the police power of the State must be considered. This is the power of a government to provide for the health, safety, morals and welfare of the people. The reasonable exercise of this power by the State is practically unlimited. With our individual rights, in order that we may peaceably live and enjoy them, there is a corresponding duty to subject these rights for the common good of others as well as ourselves. All of our rights are subject to the reasonable exercise of the police power. All

the criminal laws on our State statute books, all the police ordinances, are enacted under this power. Let me give a few examples of laws passed under this police power: our quarantine and vaccination laws, traffic laws, lighting laws, fire prevention laws, building regulations, zoning ordinances; laws regulating hotels, dance halls, sale of drugs and intoxicating liquors; our child-labor laws, minimum wage laws; our insurance and banking laws; our laws licensing doctors, dentists, lawyers, accountants, and other professions. These are but a few of many examples of laws to which our rights must yield. Our rights in organized society are not absolute. We can not do as we please with our lives and our property. Liberty is not a license. If a person assaults another, if he steals, he may be imprisoned and thus be deprived of his liberty. Take the right to own and enjoy property. That too is a relative right. A person or a corporation cannot use his or its property to invade the rights of others, to violate the health, safety, morals or general welfare of the people. A man can't build a gas station where he pleases. He can't rent his house for immoral purposes. He can't store gasoline in his basement. He can't throw garbage and rubbish around as he pleases. Many other examples of this kind could be given. Our Compensation Acts were enacted under the police power. The States that enacted the State Labor Relations Acts enacted them under the police power.

Police power such as the States exercise has not been expressly granted to the Congress in the Constitution, but impliedly Congress has the power to provide for the health, safety, morals and general welfare in connection with the powers granted. For example, under the express power to regulate commerce, Congress has enacted statutes to promote health, safety, morals and matters of general welfare to protect and promote interstate and foreign commerce. Notable examples of this are the Mann Act, Railway Labor Act, and the National Labor Relations Act.

On April 12, 1937, by a 5-to-4 decision the Supreme Court of the United States held the National Labor Relations Act constitutional. The majority opinion was by Chief Justice Hughes and the dissenting opinion by Justice McReynolds. In the dissenting opinion, Justices VanDevanter, Sutherland and Butler concurred.[8] Previous to this, six United States District Courts and four Circuit Courts of Appeal had declared this Act unconstitutional on the authority of the Schecter decision which declared the N.I.R.A. unconstitutional.

The decision of the Supreme Court in the Jones & Laughlin case came as a distinct surprise to the corporation lawyers. On the power of Congress to pass this Act under the grant of power given in the Commerce Clause, Chief Justice Hughes thus spoke for the court:

"The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement'; to adopt measures 'to promote its growth and insure its safety'; 'to foster, protect, control and restrain.' That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."

As both State and Federal governments are, under their constitutions, committed to the doctrine of separation of powers, I will briefly discuss the charges of violation of this doctrine by both State and Federal regulatory laws creating boards and commissions. Did the legislative branches of our government delegate their power to boards and com-

8 *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 57 Sup. Ct. Rep. 615, 81 L. Ed. 893 (1936).

missions in the passage of Compensation Acts and the National Labor Relations Act?

The question of delegation of legislative power was considered very early in our history. In the case of *Wayman v. Southard,*[9] decided in 1825, Chief Justice Marshall said on this question:

"Congress may certainly delegate to others powers which the legislature may rightfully exercise itself. . . .

"The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."

In the case of *United States v. Grimaud,*[10] decided in 1911, the United States Supreme Court expressed itself thus on this question: "Congress may declare its will and after affixing a primary standard, devolve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations."

The reason that the N.I.R.A. was declared unconstitutional in the Schecter case is because Congress did not provide sufficient standards. In that Act, the power to provide standards was delegated to the President and his advisory committee. The codes fixing the standards were framed by advisory committees and promulgated by the President. Here was a clear delegation of Legislative Power.

This is not the case in Workmen's Compensation Acts nor the National Labor Relations Act.

In the Compensation Acts the legislatures clearly fixed standards by providing a complete schedule of injuries and prescribing the amount of compensation for each; and also prescribing the amount of death benefits and to whom payable.

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9 10 Wheat. 1, 6 L. Ed. 253 (1825).

10 220 U. S. 506, 31 Sup. Ct. Rep. 480, 55 L. Ed. 563 (1910).

In the National Labor Relations Act, Congress clearly fixed standards by providing what constitute unfair labor practices.

In the administration of the Compensation Act, the compensation board does not fix damages for injuries nor does it award damages for negligent death. The legislature has done that. The board merely investigates and finds the facts and by the application of the compensation law to the facts found, the amount of compensation or death benefit is determined and awarded.

The same is true in the administration of the National Labor Relations Act. Congress has provided what constitutes unfair labor practices. The National Labor Board merely investigates and finds the facts and by the application of the law to the facts found, the Board enters an order to desist or to comply, as the case may be.

In neither of these cases are the awards or orders final. To make them final an appeal must be made to the courts for their enforcement.

It is also argued that these acts violate the doctrine of separation of powers by exercising judicial power. Right in this connection let me repeat that the boards and commissions are merely fact-finding bodies and not courts. They do not have judicial power. They have no power to punish for contempt nor to issue executions to enforce their orders. The issuing of a notice of a hearing, issuing of subpoenas for witnesses, the examination of witnesses, the finding of facts and conclusions are not the exercise of judicial power. If that be so, then notaries public, commissioners, referees, prothonotaries are exercising judicial powers. All lawyers and judges know that these are ministerial officers and exercise only administrative power. On this matter let me quote briefly from an opinion in the case of *Underwood v. McDuffee.*[11] The court said:

[11] 15 Mich. 361, 93 Am. Dec. 194 (1867).

"No action which is merely preparatory to an order or judgment to be rendered by some different body can be properly termed judicial. A master in chancery often has occasion to consider questions of law and of fact, but no one ever supposed him to possess judicial power. A jury in a court of record determines all the facts in a case, but the judicial power is in the court which enforces the verdict by judgment."

Now as to the denial of due process under the 5th and 14th Amendments and the State bills of rights. In the 14th Amendment it is provided that no State "shall deprive any person of life, liberty or property without due process of law." . . . The 5th Amendment prohibits Federal government from denying due process and State bills or rights also secure it. What is due process of law? What processes are essential to give it? Due process of law contemplates (1) Notice, (2) Opportunity to be heard, and (3) a fair hearing. However, what is due process in one kind of a proceeding may not be due process in another. For example, there are summary proceedings in which notice is not essential. Nor does due process require jury's finding as a part of the hearing in all cases. It has been uniformly held that in an administrative proceeding where notice of a hearing has been given and sufficient time has been given to appear at the time and place of hearing, and a fair hearing has been held (not necessarily according to formalities in court), and then to that is added a review process in the court, due process has been given.

Gentlemen, I have probably given too many details about two or three boards or commissions. The story of the advent of these is the story of the advent of all. I related how progress of the race and changes in the way of doing things as time goes on, demand different treatment, different and more expeditious procedure. Times have changed and times will continue to change. With the growth of our country, and the progress in science, invention and education, with the expansion of industry and changes in commerce, more boards and commissions may become necessary to carry on the processes of democratic government. Reasonably pro-

viding for these changes does not destroy our fundamental rights nor deny to us the inherent and inalienable "rights of life, liberty and the pursuit of happiness." It does not destroy our constitutional government. Our Constitution was not written for a decade or a century. Properly and reasonably construed it adapts itself to our progress.

In this connection, I cannot refrain from quoting from an opinion by Chief Justice Winslow in the case of Borgnis v. Falk Company (133 N. W. 209) which sustained the constitutionality of the Wisconsin Compensation Act. In that opinion Chief Justice Winslow so clearly answered all the claims raised against validity of the Act and on the question of construction of constitutions he used these words:

"But the difficulty is that, while the Constitution is fixed or very hard to change, the conditions and problems surrounding the people, as well as their ideals, are constantly changing. The political or philosophical aphorism of one generation is doubted by the next, and entirely discarded by the third. The race moves forward constantly, and no Canute can stay its progress. By what standards is this general language or general policy to be interpreted and applied to present day people and conditions? When an 18th century Constitution forms the charter of liberty of a 20th century government, must its general provisions be construed and interpreted by an 18th century mind in the light of 18th century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch the State upon a veritable bed of Procrustes. The charged social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of problems of construction and interpretation."

Speaking about reforms in procedure, Chief Justice Hughes admonished the legal profession in these words:

"You can not maintain democratic institutions by mere forms of words, or by occasional patriotic vows. You maintain them by making the institutions of our Republic work as they are intended to work. Here lies your responsibility with respect to this sphere of democratic action in translating the law of the land into the decision of particular controversies so that every citizen may be assured of equal justice according to law."

Why do we have tax commissions? Why do we have to fill out such detailed blanks as to assessments and as to our incomes? To prepare these blanks, to examine them and check them requires bureaus and many employees. Because among us there are a few tax evaders and tax dodgers, all of us — honest or dishonest must give this detailed information in order that there might be equality in taxation.

Why provide for boards of health, safety and morals? Because in organized society there are those who will disobey laws pertaining to health, safety and morals; and all of us, law-abiding as well as law-breaking, must submit to regulations and pay taxes to support health boards and commissions. You say, Why not prosecute those who violate the law? In the complexity of our life, our business, manufacturing and commerce, we have found that violators of the laws find it easy to evade them, and under technicalities of criminal process they get away with it.

Why have an Interstate Commerce Commission and Public Utilities Commission? Because some railroads and utilities charged exorbitant rates, discriminated in rates, violated safety laws, and because our processes in courts were inadequate to make them obey the laws, all law-abiding railroads and utilities as well as the criminal ones must submit to regulations by commissions.

Why have a Federal Trade Commission, a Securities Exchange Commission? To destroy unfair business practices by a few business men and to prevent stock gamblers from mulcting millions of dollars from the American investors by selling them worthless stocks and securities. We have Workmen's Compensation Commissions because our procedure in court in personal-injury cases became inadequate to provide for social and economic justice to the injured laborers of America. We have Labor Relations Acts and boards to free and emancipate labor from unjust practices by organized capital and to promote a just peace in American industry.

One more thought: on the whole, commissioners and officers of State and Federal bureaus are sincere and honest men and women, and able public officials. Many of them are lawyers, doctors, scientists and economists. The nature of their work brings them into close contact with the daily life of our people. The law imposes upon them duties that are arduous and frequently disagreeable. That they make mistakes is but human. In the Annual Report of the Attorney General of the United States for the fiscal year ending June 30, 1940, on page 47 it is stated that during the ten-year period prior to 1938

> ". . . orders of administrative agencies had fared better in the Supreme Court than had the decisions of the lower Federal courts reviewing such orders, or the decisions of such courts coming before the Supreme Court in cases not involving administrative orders. During that period the Supreme Court affirmed 64 per cent of the administrative orders which it considered. The percentage at the last term was considerably in excess of that percentage, being a fraction over 76. In contrast the percentage of affirmances of the decisions of the lower Federal courts reviewing administrative orders was only 41, and the percentage of affirmances of the decisions of those courts in cases other than those reviewing administrative orders was only 39."

Think of the thousands and tens of thousands of cases that are being handled by administrative boards and commissions throughout the United States every year. Whenever here and there we find an incompetent examiner or commissioner or hear of an erroneous decision, it is publicized everywhere and general condemnation of the administrative process results.

Statistics show that 90% of matters within the jurisdiction of administrative boards are adjusted without contest. In 10% of the cases applications are filed and half of these are adjusted and do not come to a hearing. Only 5% are contested and a very small percentage of these are reviewed before courts. Considering the nature of their work, these officials have made and are making a record of incomparable public service.

Instead of continually doubting their sincerity, misrepresenting their conduct and condemning their work, let us give them that encouragement that they deserve. George Matthews Adams says:

"Encouragement is oxygen to the soul. Good work can never be expected from a worker without encouragement. No one ever climbed spiritual heights without it. No one ever lived without it."

In the words of Justice Hughes, "you can not maintain democratic institutions by mere forms of words or by occasional patriotic vows." Gentlemen, we can not inculcate love and respect for our Government among our children and the rest of the world, if by indiscriminate criticism we condemn the men who administer it.

Democracies have been chided and scoffed at by the totalitarian dictators of Europe, and the small democracies of Europe have been ruthlessly destroyed under the philosophies of hate, and that might makes right. It is for America, the greatest Democracy in the world, to demonstrate to the people of the world that the people in Democracy can unite and stand united in the support of their Government, and that Democracy can and does work.

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